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this Memorandum Decision shall not be  
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establishing the defense of res judicata,  
collateral estoppel, or the law of the case.

APPELLANT PRO SE:

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ATTORNEYS FOR APPELLEE:

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Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DANNY L. SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0606-PC-250
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT  
The Honorable Chris D. Monroe, Judge  
Cause Nos. 03D01-9405-CF-332 and 03D01-9401-DF-47

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**September 28, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Danny L. Smith appeals the trial court's denial of his Motion to Correct Erroneous Sentence following his conviction for Attempted Burglary, as a Class C felony, pursuant to a guilty plea. Smith raises a single issue for our review, which we restate as whether the trial court erred in not granting Smith an evidentiary hearing on his motion.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On April 25, 1994, Smith pleaded guilty to attempted burglary, as a Class C felony, in Cause Number 03D01-9401-CF-47 ("Cause 47"). On August 17, the trial court sentenced Smith to four years in the Department of Correction, to be served consecutive to a sentence imposed in Cause Number 03D01-9405-CR-332 ("Cause 332") and concurrent with a sentence imposed in Cause Number 03D01-9402-CM-82 ("Cause 82"). In Cause 332, Smith had pleaded guilty to three counts of Burglary, each as a Class B felony, and one count of Resisting Law Enforcement, as a Class A misdemeanor. Smith's aggregate sentence totaled twenty-five years.

On April 3, 1998, Smith filed his first motion to correct erroneous sentence, which the trial court summarily denied. Smith did not appeal the trial court's decision. Rather, on May 10, 2001, Smith filed a second motion to correct erroneous sentence. On May 17, the trial court denied that motion "on the grounds that defendant is challenging the appropriateness rather than the legality of the sentence." Appellant's App.<sup>1</sup> Again,

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<sup>1</sup> Smith's appendix is without pagination, contrary to Indiana Appellate Rule 51(C). Smith is advised that "[a]n appellant who proceeds pro se is held to the same established rules of procedure that a trained legal counsel is bound to follow," and he must comply with the Indiana Rules of Appellate

Smith did not appeal the trial court's order. On April 5, 2006, Smith filed his third motion to correct erroneous sentence, which the court denied on May 22. In denying the third motion, the court noted "that this is at least the third time defendant has filed a similar motion. . . . The Court, being duly advised, again DENIES Defendant's motion without hearing for the same grounds as stated in the May 17, 2001 order." Id. This appeal ensued.

### **DISCUSSION AND DECISION**

Smith's third motion to correct erroneous sentence alleged that his sentences in Cause 332 and Cause 47 were improper because the facts underlying each of his convictions in those causes were part of a single episode of criminal conduct. Hence, Smith argues that his twenty-five year aggregate sentence is improper under Indiana Code Section 35-50-1-2 ("consecutive sentencing statute"). The current version of the consecutive sentencing statute provides as follows:

except for crimes of violence, [which includes burglary, as a Class B felony,] the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Ind. Code § 35-50-1-2 (2007).<sup>2</sup> Although the preferred procedure for presenting a sentencing error is a petition for post-conviction relief, a motion to correct erroneous

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Procedure. See Anthony v. Ind. Farmers Mut. Ins. Group, 846 N.E.2d 248, 252 (Ind. Ct. App. 2006). Nonetheless, as the lack of pagination does not prohibit our review, we consider Smith's appendix.

<sup>2</sup> Notably, the version of the consecutive sentencing statute in effect at the time Smith committed the crimes in question contained no such limitation to the trial court's sentencing authority. See Ind. Code § 35-50-1-2 (1993). We also note that, at that time, the presumptive sentence for a Class A felony, the next highest felony for that which Smith was convicted, was thirty years. See I.C. § 35-50-2-4 (1993).

sentence may be used to correct those errors where the sentence is erroneous on its face. Parrott v. State, 800 N.E.2d 620, 621-22 (Ind. 2003).

A trial court may correct an erroneous sentence when a sentence is facially defective. I.C. § 35-38-1-15 (1998); Mitchell v. State, 726 N.E.2d 1228, 1243 (Ind. 2000). A sentence is facially defective if it violates express statutory authority at the time it is imposed. Mitchell, 726 N.E.2d at 1243. When we review the trial court's decision on such a motion, we "defer to the trial court's factual finding" and review its decision "only for abuse of discretion." Id. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999). However, we will "review a trial court's legal conclusions under a de novo standard of review." Mitchell, 726 N.E.2d at 1243.

Initially, we note that Smith confuses the standards applicable to petitions for post-conviction relief with the standards that apply to motions to correct an erroneous sentence. Motions to correct an erroneous sentence require neither an evidentiary hearing nor an indigency hearing; indeed, the premise of such motions is that the sentence imposed is facially invalid. It is undisputed that Smith filed a motion to correct erroneous sentence pursuant to Indiana Code Section 35-38-1-15, and that he alleged a sentencing error under the consecutive sentencing statute. Hence, Smith's position that he was entitled to a hearing is misplaced.

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However, Smith's aggregate sentence was twenty-five years. It is therefore not clear exactly how the consecutive sentencing statute would provide Smith relief.

The trial court did not abuse its discretion in denying Smith’s third motion. Again, “a motion to correct sentence may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of the statutory authority.” Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). However, in order to determine whether Smith’s multiple convictions arose from the same episode of criminal conduct, the court would have had to look beyond the face of the judgment imposing the sentence, which would have been improper. See id. We therefore must affirm the trial court’s decision.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.